Robert Q. Lee for many years. *Id.* Julian cursed and hung up the telephone. *Id.*

Agent Gregory was "a little upset" when Julian hung up on him. (C.A.E.R. 197, 310). Although he had known that there was an outstanding arrest warrant in Florida for a "Christopher Lee," since he had received the lead in July, 1999 and had done nothing with respect to it, Gregory now acted. (C.A.E.R. 172-173). Immediately after the telephone call in which Mr. Lee complained of Gregory's actions, cursed and then hung up, Gregory telephoned the Dade County Sheriff's Office and had that office fax him a copy of the 1998 Florida state warrant for "Christopher" Lee. (C.A.E.R. 79-80, 197).

The same day, April 21, 2000, Gregory called the San Diego Sheriff's Department's Encinitas Substation and "briefed" the watch commander, Sergeant Bulow. (C.A.E.R. 80). He then faxed Sergeant Bulow a copy of the Florida warrant. *Id.* Within 30 minutes of his call with Sergeant Bulow, Gregory appeared at the Encinitas Substation. (C.A.E.R. 218-219). He told Sergeant Bulow that there was a "Florida warrant for a man living in Encinitas, California" and asked Bulow if the Sheriff's Department "could help serve it." (C.A.E.R. 219). Gregory gave Bulow Mr. Lee's address and a description of his car. *Id.* Gregory told Bulow that "the suspect is a large man" and gave Bulow the copy of the warrant. *Id.*

Gregory gave Julian's home address to Sergeant Bulow and said that address was where Christopher Lee, the Florida warrant suspect, lived. (C.A.E.R. 219, 224, 312). Agent Gregory also gave Sergeant Bulow a description of Julian's car and told him it belonged to the same Florida warrant suspect. (C.A.E.R. 219, 312).

Gregory never informed Bulow that the warrant might not pertain to Julian Lee; nor did he disclose to Bulow that Robert Q. Lee had misappropriated Julian Lee's middle name, social security number and date of birth. (C.A.E.R. 100-101). He did not suggest that the applicability of the Florida warrant to Julian Lee required any inquiry before the sheriffs executed the warrant. (C.A.E.R. 101).

Sergeant Bulow then told San Diego County Sheriff's Deputy John Maryon and his partner, Deputy Marco Garmo about the warrant. (C.A.E.R. 221, 311). At one point Maryon called Gregory because he was curious about how Gregory had obtained the warrant. (C.A.E.R. 222, 311). Gregory told Maryon that he wanted to be contacted when Julian was arrested so he could talk to Julian. (C.A.E.R. 223).

In deposition, Agent Gregory said he did not remember what information he had given to the state deputies after unequivocally telling Bulow that Julian Lee was the subject of the Florida warrant:

> Q: Did you advise Deputy Maryon that the Plaintiff's identity had been misappropriated by the Plaintiff's brother?
>
> A: I don't remember whether I advised him of that . . . .
>
> Q: Did you tell him that the federal fugitive had used the alias "Christopher" Lee?
>
> A: I don't remember if I told him that or not. . . .
>
> Q: Didn't you tell them that you were investigating a fugitive who had used the alias Christopher Lee?

A: I don't remember if I told them that.

Q: What could refresh your recollection?

A: Perhaps Divine Intervention. (C.A.E.R. 312).

Deputy Maryon swore that:

> At no time during my contact with Gregory did he inform me that the warrant did not apply to the plaintiff, that the warrant's applicability to plaintiff needed to be investigated, that plaintiff's identity including his name, social security number and date of birth had been misappropriated by plaintiff's brother or that plaintiff's brother used plaintiff's name as an alias. (C.A.E.R. 231).

Garmo and Maryon both testified that they would never have arrested Julian if Agent Gregory told them that Robert Q. Lee had misappropriated his identity. (C.A.E.R. 212, 312-313).

Deputy Garmo testified:

Q: In other words, Maryon never told you that he had learned from the FBI that the FBI had knowledge that the wanted brother of this person had misappropriated his identity and was going under that name?

A: No. The FBI never gave us that information. If, in fact, if we had that information, we would not have arrested him. . . .

Q: But what you just said was that if the FBI told you that the wanted brother had used this man's identity, you wouldn't have effected the arrest?

> A: Of course not. It would have been an unlawful arrest.

(C.A.E.R. 211-212).

On May 4, 2000, Deputy Maryon and his partner, Garmo, arrested Julian on the Florida warrant as Julian was driving to the store. They decided not to do a felony hot stop because Julian seemed like a "nice guy" and "didn't seem to be too much a threat." (C.A.E.R. 225-226 313). Julian was very "cooperative" during the arrest. (C.A.E.R. 90, 313). Julian told the deputies that he was not the person wanted by the warrant, that he had never been to Florida; and that his brother was using his identification. (C.A.E.R. 313). Julian repeatedly told the deputies they were making a mistake, "several times, over and over." *Id.*

As he had promised, Maryon telephoned Gregory, who arrived at the station within 15-20 minutes. Gregory spoke to Julian, who was in a holding cell. (App. 30). Gregory told Julian:

> Are you ready to talk to me now? The last time I talked to you, you had an attitude. Do you want to go home? Do you want to get out of here tonight? Then tell me where your brother is.

Id. Gregory also told Julian Lee, "If you want to get out of this Florida situation, you better talk to me now about your brother, otherwise you will be staying here in jail." *Id.*

Julian told Gregory that he did not know where his brother was and that he had not seen him for many years. *Id.* He told Gregory that his brother had been using his name and social security number and that his family

actually learned this information from the FBI itself, several years earlier. *Id.*

Julian Lee told Gregory that Julian had never been to Florida; he said that he was not the person named in the warrant; he pointed out that he was several inches taller, almost 100 pounds heavier (he weighed 290 pounds on the day of the arrest); had a different hair style, different color eyes, and a different complexion. Julian told Gregory that Gregory could call Julian's "job" and that his employers could verify that he had been working there since June, 1998 and could not have committed a crime in Florida in December, 1998. (App. 30-31).

Julian Lee asked Gregory to "check" because Gregory was arresting the wrong person (App. 31). Gregory smiled and asked again for information regarding Robert Lee. *Id.* When Julian Lee stated, at one point, that he was not the person named in the Florida warrant and had never been in Florida, Gregory did not object. *Id.* Gregory smiled and stated that Julian Lee's name and the name on the warrant were the same. *Id.* Gregory said that, if Julian wanted to clear the matter up, he had better provide the information Gregory wanted. *Id.* After Julian Lee reiterated that he had no information about his brother, Gregory smiled again, threw up his hand and said, "Have a nice flight to Florida." *Id.*

Julian Lee filed a complaint against Gregory pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, *et seq.* The complaint alleged in its *Bivens* action that Gregory's actions had violated, *inter alia*, (1) Julian Lee's First Amendment right to speak as he

felt appropriate to government agents without threat of vindictive governmental reprisal or retaliation; and (2) Julian Lee's Fourth Amendment right to be free of unreasonable search and seizures and to be free of arrests without probable cause. (App. 9). The First Amendment claim was based upon *City of Houston v. Hill*, 482 U.S. 451 (1987) (the arrest of a citizen for protesting a police action is a violation of the First Amendment). The First Amendment claim was an intent-based tort under *Crawford-El v. Britton*, 523 U.S. 574 (1998).

The complaint alleged that " . . . by causing the arrest and continued detention of Julian Lee, defendant Gregory arrested him without probable cause, in an unreasonable manner, under circumstances that would lead a reasonable person to believe that there was no probable cause to arrest Julian C. Lee." *Id.*

The *Bivens* count alleged that Gregory caused the arrest and continued detention "to retaliate against Julian C. Lee for what Mr. Lee had said to Gregory in enunciating his complaints with Gregory's action, which comments were protected by the First Amendment." (App. 10).

Count one sought punitive damages against Gregory based on the oppressive, fraudulent and malicious nature of the conduct. (App. 11). The complaint also alleged, under the Federal Tort Claims Act, the following causes of action in these counts: (2) a violation of the Unruh Act, a state statute (California Civil Code § 51, *et seq.*); (3) false arrest and false imprisonment; (4) malicious prosecution, which alleged a favorable termination of the extradition action and that Gregory acted with malice; (5) abuse of process; (6) battery; (7) intentional infliction of emotional distress; (8) negligence; (9) negligent infliction of emotional

distress; (10) negligent supervision and training; and (11) negligent hiring and retention.

Defendants Gregory and United States filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Criminal Procedure and an early motion for summary judgment. The district court dismissed counts 2, 10 and 11, denied the balance of the motion to dismiss, and ruled that the complaint stated a claim sufficient to permit discovery. (C.A.E.R. 27-44). The district court's ruling on this motion belies Gregory's claim that the court relied upon some impermissible "subjective" test in permitting the case against him to go forward.

> Plaintiff argues that the analysis focuses on whether a "reasonable officer could have believed that probable cause existed to arrest" Plaintiff. *Hunter v. Bryant*, 502 U.S. 224 (1991). This is an objective analysis, focused on a reasonable officer confronted with the facts and circumstances actually known to the defendant officer. *Act Up!/ Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993). Plaintiff further argues that it has been clearly established that a valid arrest under a warrant may only occur if the arresting officers reasonably believe the arrestee is the person sought in the warrant, citing to *Hill v. California*, 401 U.S. 797 (1971). In *Hill*, the Supreme Court found that "sufficient probability" is the touchstone of reasonableness under the Fourth Amendment. *Id.* at 804.
>
> After an analysis of the applicable law, the court finds that the Plaintiff has sufficiently demonstrated that Agent Gregory may face § 1983/ *Bivens* liability "for executing a warrant in an unreasonable manner." See *Bergquist v. County of Cochise*, 806 F.2d 1364, 1369 (9th Cir. 1986)

> (overturned on other grounds by *City of Canton v. Harris*, 489 U.S. 378 (1989)), and specifically for the arrest of a person with a warrant when the officer believes that the person is not the one named in the warrant. Accordingly, the relevant question for the court is: Would a reasonable officer confronted with the facts and circumstances actually known to Agent Gregory have determined that there was a sufficient probability that Plaintiff was the person named in the Florida arrest warrant? (C.A.E.R. 35)

The district court's ruling also addressed the ***mental element*** to be proven on the issue of the false arrest cause of action alleged under the Federal Torts Claims Act, which required proof of malice. (C.A.E.R. 42-43).

After discovery Gregory filed a motion for summary judgment as to the *Bivens* claim, while the United States sought judgment on the Federal Torts Claims Act causes of action. Gregory argued that, because he himself did not perform an arrest or take Mr. Lee into custody, he violated no federally protected right of Mr. Lee. He argued that, because the Florida warrant was "facially valid" and matched Julian Lee's name, gender, race, date of birth, and social security number, Gregory's "limited role" in obtaining a copy of the felony arrest warrant from law enforcement authorities in one state and then providing it to local law enforcement authorities elsewhere "did not give rise to any constitutional violation." Finally, Gregory argued that there was no clearly established law by which a reasonable agent could know of the illegality of the conduct.

The district court denied Gregory's motion for summary judgment, holding that procuring an unlawful arrest

can give rise to liability and finding that factual disputes made summary judgment inappropriate. (C.A.E.R. 232-246). The district court found that factual disputes as to whether Gregory acted with malicious intent precluded summary judgment on the false arrest, malicious prosecution and abuse of process causes of action. (C.A.E.R. 242-243).

The Court of Appeals' ruling on Gregory's interlocutory appeal rejected Gregory's claim that he could not be liable because he did not personally effect the arrest. It held that Gregory's intent or motive in causing Julian Lee's arrest was irrelevant to the analysis of Mr. Lee's Fourth Amendment claim. This claim, the Court held, must be resolved on an objective standard based on Gregory's actual knowledge of the facts at the time of Julian's arrest. Gregory's claim, that no reasonable officer could believe that causing the arrest of the wrong person is against clearly established law, was rejected.

ARGUMENT

There Is No Jurisdiction Under *Johnson v. Jones*

Counsel for Julian Lee wishes to bring to the Court's attention that the Court of Appeals that rendered the decision was without jurisdiction to do so and that this court is without jurisdiction to act on the petition for *certiorari*. Gregory's appeal presented the following issue for review as the sole question for determination by the Court of Appeals: "Whether, in this *Bivens* action alleging Fourth Amendment violations arising out of plaintiff's arrest in a case of mistaken identity, the district court erred in concluding that triable issues of material fact exist that preclude granting summary

judgment to FBI agent Gregory, based on his claim of qualified immunity." (Gregory's opening brief, p. 2). *Johnson v. Jones*, 515 U.S. 304 (1995), which holds that a defendant entitled to invoke a qualified immunity defense may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial compels that conclusion that the Court of Appeals was without jurisdiction to determine Gregory's interlocutory appeal pursuant to 28 U.S.C. § 1291.

Gregory may seek this Court's review by arguing that in rendering its decision, the Court of Appeals ruled on an issue of law that is now appropriate for review on *certiorari*. Given the single issue, however, as presented to the Court of Appeals by Gregory, the Court of Appeals was without jurisdiction *ab initio*.

The factual statement upon which Gregory bases his petition argues the facts in the light most favorable to him. He omits critical facts adverse to his petition and colors others in a misleading way. For example, he says, "At the same time, FBI records indicated that respondent's brother, Robert Lee, ***might*** have used 'Christopher Lee' as an alias." (Pet. 3). There is no "might" in the evidence. The state prosecutor wrote that the information received "*is* that subject ***has changed*** his name to Christopher Lee, d.o.b. 3/7/67 . . . " (App. 33). The FBI agent swore before the magistrate that "Robert Q. Lee ***has changed*** his name to Christopher Lee. . . . " (App. 38). The magistrate judge issued a federal arrest warrant for "Robert Q. Lee, a/k/a Christopher Lee" based on the outstanding complaint against Robert Q. Lee, a/k/a Christopher Lee (App. 35). Gregory asserts that "the social security number, date of birth, race and gender

listed on the warrant were all exact matches for respondent," (Pet. 3) but fails to disclose that Gregory knew that Robert Lee had used the respondent's date of birth and social security number. (C.A.E.R. 56, 117-119, 289).

Gregory's lawyer on appeal tells the court "one factor beyond the matching social security number and birthday pointed decisively toward the conclusion that respondent and not his brother was the person sought by Florida authorities. The FBI description of respondent's brother indicated that he had multiple identifying marks, including scars on his neck and thigh and a tattoo on his left forearm. (C.A.E.R. 85). The Florida warrant's 'scars or tattoos' line did not list any identifying marks. *Id.* at 83." (Pet. 4)

Gregory's petition does not reveal that this "decisive" factor was never mentioned by Gregory in his affidavit, nor at any time during his depositions; that there is no evidence Gregory ever read or even knew of any issue concerning "scars or tattoos" anywhere in the record; that Gregory *never mentioned* this "decisive" fact in any pleading filed in the district court, including his two motions for summary judgment. Nor does Gregory reveal that this "decisive" fact was never presented to the Court of Appeals in any briefs nor in his petition for rehearing *en banc*. The fact was apparently discovered during the preparation of his *certiorari* petition. It now forms a "decisive" part of the basis for his argument.

In these instances and throughout his factual presentation, Gregory has relentlessly violated the rule requiring that the issue of qualified immunity be determined on the basis of facts in the light most favorable to the party claiming the violation; that on appeal, the facts must be

taken in the light most favorable to the non-moving party. He complains that: "In answering that question, the Ninth Circuit did not identify any dispute about the evidence before Agent Gregory – *i.e.*, what agent Gregory saw and heard." (Pet. 7). Of course this is true. Gregory's right to bring an interlocutory appeal requires that the question on the appeal be one presenting "neat abstract issues of law" in which "purely legal matters are at issue." *Johnson v. Jones*, 514 U.S. 304, 316-317 (1995). Gregory's argument, as he presses it here, is an attempt to appeal the district court's order, on issues of fact. Gregory so distorts the factual record as the basis for his legal argument that, after complaining at length that the Court of Appeals has improperly smuggled subjectivity back into Fourth Amendment qualified immunity analysis, he is moved to assert, "The evidence, moreover, shows that agent Gregory *subjectively* believed respondent was named in the Florida warrant." (Pet. 26).

Gregory's petition, to be sure, repeatedly attempts to trick out a legal issue. This he does by constantly inserting his parenthetic rephrasing of the Circuit Court's actual holding, *e.g.*: " . . . by asserting that agent Gregory actually knew" – *i.e.*, that Gregory subjectively concluded from the evidence before him . . . (Pet. 9); and . . . alleging that the officer effected the seizure knowingly – *i.e.*, after subjectively concluding that the suspect was innocent." (Pet. 11). Gregory's argument is premised on assertions of disputed facts. He faults the Ninth Circuit for failing to ask, as an objective matter, whether the disputed facts he posits would provide an objectively reasonable basis for an arrest. (Pet. 13). Although Gregory does not formally label his petition as one which raises the issue of whether the pretrial record sets forth a "genuine" issue of fact for trial,

his petition has done so in substance, under the guise of seeking resolution of a legal question. *Johnson* makes clear that there is no appellate jurisdiction for an interlocutory appeal of an order denying qualified immunity insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial. *Johnson*, *supra*, at 309, 320. The unanimous court in *Johnson* described the harm which promiscuous litigation of interlocutory appeals can cause, including delay and wasted, unnecessary work by appellate courts. *Id.* at 309. The Court noted that questions about whether or not a record demonstrates a "genuine" issue of fact for trial, if appealable, can consume inordinate amounts of appellate time. *Id.* at 316. The *Johnson* Court held:

> We recognize that, whether a district court's denial of summary judgment amounts to (a) a determination about preexisting "clearly established" law, or (b) a determination about "genuine" issues of fact for trial, it still forces public official to trial. See Brief for Petitioners 11-16. And to that extent, it threatens to undercut the very policy (protecting public officials from lawsuits that (the *Mitchell* Court held) militates in favor of immediate appeals. Nonetheless, the countervailing considerations that we have mentioned (precedent, fidelity to statute, and underlying policies) are too strong to permit the extension of *Mitchell* to encompass appeals from orders of the sort before us.

515 U.S. at 317-318.

Gregory's appeal, albeit nominally one which states a legal question for review, in substance is so intertwined with his disputed factual submission that it requires application of the *Johnson* rule. Gregory's legal question, and his petition as presented, is merely a *sub rosa* attempt to obtain appellate review of factual issues by this Court,

which should not be forced into sitting as a district court judge to parse disputed submissions of fact or asked to determine a "legal" issue in a fact-bound, fact-based case when the facts are in dispute. Even if Gregory's petition presents a valid legal question for which review under 28 U.S.C. § 1291 would be appropriate, by relying, as he does, on disputed factual submissions, by slanting the record in the light ***most favorable*** to him, and by relying on factual arguments that were neither raised in the district court nor considered or relied upon by the Court of Appeals (*e.g.*, the issue of scars and tattoos), Gregory has run head-on into *Johnson*'s policy. He has submitted, at best, a legal issue whose resolution will require the Court to deal *in extenso* with disputed factual issues, a problem he has caused by the improper factual submission in his petition. The Court should deny his petition for lack of jurisdiction.

An Examination Of Gregory's Knowledge Is Critical To Determine The Reasonableness Of His Conduct

Gregory's semantic attempt to convert the inquiry into Gregory's knowledge of relevant fact into a proscribed inquiry into motive must fail. While intent or motive are ordinarily not relevant to Fourth Amendment analyses, the officer's knowledge of facts is critical to a determination of the objective reasonableness of his conduct. Whether an arrest is constitutionally valid depends on whether, at the time the arrest is made, the officers have "facts and circumstances ***within their knowledge and of which they had reasonably trustworthy information***" sufficient to warrant "a prudent man in believing that the person to be arrested had committed or was committing an offense." (emphasis added) *Beck v. Ohio*, 379 U.S. 89, 91

(1964), citing *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949); *Henry v. United States*, 361 U.S. 98, 102 (1959); See also *Saucier v. Katz*, *supra*, at 207; *Hunter v. Bryant*, *supra*, at 228. This Court has consistently held that examination of the officer's knowledge is the *sine qua non* to determine probable cause: "Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." *Devenpeck v. Alford*, 543 U.S. 146 (2004), citing *Maryland v. Pringle*, 540 U.S. 366, 171 (2003). To assess whether probable cause exists, one must ask whether the facts actually known to the officer are sufficient to constitute probable cause. The Fourth Amendment inquiry is whether the officer's actions are objectively reasonable in light of the facts and circumstances confronting him. *Graham v. Connor*, 490 U.S. 386, 397 (1989).

The Court's qualified immunity jurisprudence, while it eschews inquiry into motive, requires an analysis of what the officer actually knew:

> It follows from what we have said that the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials.

Anderson v. Creighton, 483 U.S. 635, 641 (1987).

The question of what the officer knew permits an officer to explain that he reasonably believed something which turned out to be wrong. Gregory relies on the principle that "when the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the

second party is a valid arrest." *Hill v. California*, *supra*, at 802.

If the officer reasonably believes something which turns out to be mistaken, he is entitled to qualified immunity. The "objective reasonableness" standard gives ample room for mistaken judgments *Malley v. Briggs*, 475 U.S. 335, 343 (1986). To determine whether a judgment is based on a reasonable mistake, the question must be asked as to what the officer reasonably believed. Thus, the inquiry into whether an officer acted reasonably requires a determination of what was in the official's mind; *i.e.*, what did he know, what did she believe? Then the question becomes whether the officer acted in an objectively reasonable way based on that knowledge. A blanket condemnation of inquiry into what the official had in his mind, as a probing into alleged "subjective belief," misses the mark. The fact is, before the court can judge the objective reasonableness of an officer's action, it must make an inquiry into what was in the officer's mind – what were the facts and circumstances as he or she reasonably believed them to be. This Court's cases do hold that an officer's intent or motive does not invalidate an action which is objectively reasonable, based on the facts and reasonable beliefs and inferences in that officer's mind. One "subjective" inquiry is forbidden: what was the private motive or intent? Another "subjective" inquiry is mandated under *Beck v. Ohio*: what did the officer know or reasonably believe? The determination of objective reasonableness and hence, of qualified immunity starts with this question which, of necessity, requires evidence of what the officer ***believes*** the facts to be.

Gregory's Conduct, In Light Of His Knowledge, Was Unreasonable

The legal question, based on a proper rendition of facts, is whether, in light of his actual knowledge of the facts, Gregory's actions in causing state officers to arrest Mr. Lee and his failure to disclose to the arresting officer the relevant facts of which he had knowledge, were reasonable. Gregory had actual knowledge that (1) Julian Christopher Lee was 6'3" and weighed 270 pounds; (2) Robert Q. Lee, Julian's brother, was a fugitive who had changed his name to Christopher Lee, and had misappropriated Julian's date of birth and social security number; (3) in 1994, Robert Lee was described as being six feet tall and weighing 180 pounds; (4) in his career Gregory had never seen a discrepancy between a warrant description and the subject to be greater than 30 to 40 pounds; (5) Julian Lee had no previous criminal record; (6) a witness had stated that Julian Lee's physical characteristics did not fit the warrant description, and the same witness, reviewing a photograph of Robert Q. Lee a/k/a Christopher Lee, had stated that the person depicted was ***not*** respondent Julian Lee; (7) the federal complaint and affidavit, and the warrant for the fugitive, were for Robert Q. Lee, a/k/a Christopher Lee; and (8) FBI records showed that there was a possibility that Robert Q. Lee had lived in the Southeastern United States, but there was no evidence that Julian Lee had ever been in or lived in Dade County, Florida, from where the state warrant issued.

Having actual knowledge of these facts, Gregory then obtained a copy of the Florida State warrant for "Christopher Lee," called local California authorities, and represented unequivocally that Julian Lee was the subject of the Florida warrant, asking that he be notified when they

arrested Mr. Lee. Gregory failed to disclose to the state official that there were significant discrepancies between the subject of the warrant and Julian Lee and that the fugitive he was seeking had assumed Mr. Lee's identity, including his middle name, date of birth and social security number. Gregory even failed to tell the state officers that there might be some question or issue that the person he told them was the one to be arrested on the Florida warrant might not be the right one. In reliance on Gregory's representation, the state officials then arrested Mr. Lee, which they assert they would never have done, had Gregory disclosed the facts. The deputies ignored Julian Lee's protestations of innocence at the time of his arrest. When Julian Lee explained to Gregory that his brother Robert has assumed Julian's identity and that Julian was grossly dissimilar to the suspect described in the Florida warrant (all of which Gregory already knew to be true), Gregory informed neither the California deputies nor the Florida officials of any of the facts, leaving Mr. Lee to be held in custody and extradited.

Gregory's conduct in this case was patently unreasonable. If the officers in *Baker v. McCollan*, 443 U.S. 137 (1979) had known when they arrested Linnie Baker that his brother Leonard had procured a duplicate license, and had assumed Linnie's identity, they would never have arrested him. When the jailer discovered that Linnie's brother had assumed Linnie's identity, he immediately released Linnie Baker from custody.

In *Hill v. California*, *supra*, the Court was clear that the officers made a reasonable mistake in arresting the wrong person. Gregory's defense, that he should not be subject to suit because he made a reasonable mistake, is meritless.

There Is No Actual Conflict Among The Circuits

Gregory contends that the First Circuit's decisions in *Floyd v. Farrell*, 765 F.2d 1 (1985) and *Brady v. Dill*, 187 F.3d 104 (1999) conflict with the Ninth Circuit's holding in this case.

He is wrong. *Floyd v. Farrell* held that:

> Probable cause exists when facts and circumstances ***within the arresting officer's knowledge*** and of which he had "reasonably trustworthy information" warrant a reasonable belief that the defendant is committing or has committed a crime . . . 705 F.2d 1, 5 (emphasis added).
>
> The Harlow standard requires that we make an objective analysis of the reasonableness of conduct in light of the facts ***actually known*** to the officer and not consider the officer's motives for conduct to be considered in evaluating a qualified immunity defense. 705 F.2d 1, 6 (emphasis added).

This decision holds:

> Allegations of ulterior motives cannot invalidate police conduct that is justified by probable cause. Whren v. United States, 517 U.S. 806, 811-15 (1996). Thus, if Gregory's motive in causing Julian's arrest was to squeeze Julian for information about Robert, Whren does render such motive irrelevant. However, Gregory's contention ignores the fact that his conduct must be "objectively reasonable in light of the facts and circumstances confronting him without regard for [his] underlying intent or motivation. Graham v. Connor, 490 U.S. 386, 397 (1989) (emphasis added). Gregory's actions are not impugned because of

> his motive but because of his claimed knowledge that Julian was not the person named in the Florida arrest warrant.
>
> Julian contends that in light of the facts and circumstances confronting Gregory, Gregory actually knew that the Florida warrant applied not to him but to Robert. The district court found the evidence presented a genuine issue of material fact as to whether Gregory actually knew that the warrant did not apply to Julian. We may not review that determination. We may not review that determination. *Mendocino Envtl Ctr.*, 192 F.2d at 1291. Gregory's contention that his **actual knowledge** should be ignored is completely without merit. (Pet. App. 7a).

Farrell requires that the analysis be based on what is "actually known". This case states that the Court must look to material facts within the officer's "actual knowledge". Gregory may object to the Court of Appeals' application of the legal standard to the facts of this case, but the legal standard in *Farrell* is the same as the standard here. There is no conflict.

Brady v. Dill is simply inapposite to the instant case. Brady took pains to note:

> We emphasize that we are dealing here with a situation in which the troopers arrested and took into custody the individual who was named in a ***facially valid warrant***. If the police were to mis-execute a warrant, i.e., if they were to arrest someone ***other than the person named in the warrant because of mistaken identities, a different case would arise***.

187 F.3d 104, 115 n.10 (emphasis added).

The Law Provides Ample Protection For Officers Who Arrest The Wrong Person, Acting Reasonably But By Mistake

Gregory's lament that this case presents a future peril for law enforcement officers who will be subject to attack by clever plaintiffs' lawyers is unfounded. This Court's jurisprudence provides ample protection for officers who effect mistaken arrests. The two-party analysis of *Saucier v. Katz*, *supra*, coupled with the protection of *Anderson v. Creighton*, *supra*, insure that officers who arrest the wrong person are immune from suit, if they act reasonably, based upon the knowledge they have at the time of the arrest. The "objective reasonableness" standard gives ample room for mistaken judgments. *Malley v. Briggs*, 475 U.S. 335, 343 (1986). The requirement that the assessment of qualified immunity be based upon the officer's actual knowledge is no threat to law enforcement. By focusing on what the officer knew at the time, it allows ample room for reasonable mistake. It will insure that qualified immunity will protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, at 341.

The standard also permits the innocent injured to seek redress from those few who, like Gregory, act in a clever but unconstitutional way.

Respectfully submitted,

EUGENE G. IREDALE, ESQ.
LAW OFFICES OF EUGENE G. IREDALE
West F Street, 4th Floor
San Diego, California 92101
TEL: (619) 233-1525
FAX: (619) 233-3221

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JULIAN C. LEE, an individual, Plaintiff, v. JAKE GREGORY, UNITED STATES OF AMERICA, and DOES 1 through 10, inclusive, Defendants.	CASE NO. 01CV0739-K(RBB) **PLAINTIFF'S FIRST AMENDED COMPLAINT FOR:** (1) *Bivens* Action (2) Unruh Act (3) False Arrest/Imprisonment (4) Malicious Prosecution (5) Abuse of Process (6) Battery (7) Intentional Infliction of Emotional Distress (8) Negligence (9) Negligent Infliction of Emotional Distress (10) Negligent Supervision and Training (11) Negligent Hiring and Retention **JURY DEMAND IS HEREBY MADE**

COMES NOW, Plaintiff JULIAN C. LEE, by and through his attorneys of record, Law Offices of Eugene G. Iredale, by Eugene G. Iredale, Esq. and Law Offices of Douglas S. Gilliland, by Douglas S. Gilliland, Esq. and allege and complain as follows:

I.

GENERAL ALLEGATIONS

1. Jurisdiction is proper in the United States District Court for the Southern District of California pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1346(b)(1), *et. seq.* Venue is proper because at all times relevant hereto, all of the acts or omissions giving rise to the liability of these defendants occurred in San Diego County, California.

2. Plaintiff Julian C. Lee's claim under the Federal Tort Claims Act was timely filed on October 20, 2000 and was denied on April 24, 2001 by the United States Department of Justice – Federal Bureau of Investigation by the letter attached hereto as Exhibit 1 and incorporated herein by reference, thereby satisfying the Federal Tort Claims Act claim form requirements.

3. At all times relevant to this complaint, Plaintiff JULIAN C. LEE was an individual residing in San Diego County, California.

4. At all times relevant to this complaint, the Federal Bureau of Investigation was a federal agency of defendant UNITED STATES OF AMERICA and was operating in San Diego County, California through, in part, its agent Defendant JAKE GREGORY.

5. At all times relevant to this complaint, Defendant JAKE GREGORY was an individual employed by the Federal Bureau of Investigation, and was at all times hereto working within the course and scope of that employment and the acts and/or omissions of Defendant JAKE GREGORY, intentional or otherwise, were endorsed, ratified and approved by Defendant UNITED STATES.

6. Plaintiff LEE is truly ignorant of the true names and capacities of DOES 1 through 10, inclusive, and will amend this complaint once their identities have been ascertained as well as the facts giving rise to their liability. These defendants were agents, servants and employees of each other or of the other named defendants and were acting at all times within the full course and scope of their agency and employment, with the full knowledge and consent, either expressed or implied, of their principal and/or employer and each of the other named defendants and each of the defendants approved or ratified the actions of the other defendants, thereby making the currently named defendants herein liable for the acts and/or omissions of their agents, servants and/or employees.

II.

FACTS

Plaintiff, JULIAN C. LEE hereby realleges paragraphs 1 through 6 of this Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

7. Plaintiff JULIAN C. LEE was born on March 7, 1967, at Fort Bragg in Fayetteville, North Carolina while Mr. Lee's father was in the Army. After his honorable discharge, Plaintiff JULIAN C. LEE's father raised the family in New Jersey where he was a Willingsborough, New Jersey police officer.

8. After high school, Plaintiff JULIAN C. LEE joined the United Stated Marine Corps. Plaintiff JULIAN C. LEE graduated in the top of his class and became a weapons instructor in Quantico, Virginia. At Quantico, Plaintiff

JULIAN C. LEE taught classes in weapons and static displays to FBI Agents, DEA Agents and officers from every branch of the armed services.

9. When Desert Storm began, Plaintiff JULIAN C. LEE was transferred to Camp Pendleton where he was a section leader in a weapons company. His unit was transferred to Pakistan where it was involved Desert Storm's Desert Shield strategy and "island hopped," freeing allied prisoners of war.

10. After his military service, Plaintiff JULIAN C. LEE returned to California to begin his civilian life. Plaintiff JULIAN C. LEE worked as a foreman with the San Diego Gas and Electric Company and later for Continental Central Credit. When his father had a stroke, Plaintiff JULIAN C. LEE went into commercial fishing in Alaska and worked 7 days a week so he could help pay his father's medical bills and help buy his parents a house that would accommodate his father's wheelchair.

11. After helping to buy his parents a house, Plaintiff JULIAN C. LEE moved back to California. In July of 1998, he resumed work in the collection industry working for Household Automotive Finance. Plaintiff JULIAN C. LEE has worked with Household Automotive Finance continually since July of 1998 (and sends his parents $500.00 every month). Plaintiff JULIAN C. LEE is an impressive, upstanding citizen. He has never been in trouble with the law.

12. Plaintiff JULIAN C. LEE has a brother named Robert Lee. Robert also goes by the name of Razul. Robert is a fugitive and is wanted on robbery and assault charges. He has also been the subject of a television episode on America's Most Wanted. Robert is estranged from his

family and they have no idea where Robert lives. They have not heard from Robert nor seen him in many years.

13. Over the years, Robert has used many aliases. In the past, he has used Plaintiff JULIAN C. LEE's name and social security number in several states and this was well known to the FBI. For years, the FBI has routinely checked with Plaintiff JULIAN C. LEE's parents to see if they have heard from Robert.

14. In July 1998, an FBI agent, Defendant JAKE GREGORY, visited one of Plaintiff JULIAN C. LEE's old roommates, Grace Kessler. Defendant JAKE GREGORY said his investigation had nothing to do with Plaintiff JULIAN C. LEE. He said he just wanted to ask Plaintiff JULIAN C. LEE some questions about his brother "Robert aka Razul."

15. A few months later, an FBI agent, Defendant JAKE GREGORY, contacted Plaintiff JULIAN C. LEE's old girlfriend Jana Dubraveak. Again the agent said the inquiry was not about Plaintiff JULIAN C. LEE. Defendant JAKE GREGORY was inquiring about "Robert aka Razul."

16. In April, 2000, an FBI agent, Defendant JAKE GREGORY, contacted one of Plaintiff JULIAN C. LEE's old roommates named J.B. and asked him to come into his Carlsbad office to answer some questions. In the office, Defendant JAKE GREGORY showed J.B. a picture of Robert Lee. J.B. said he had never seen Robert Lee before.

17. On April 28, 2000, FBI agent Defendant JAKE GREGORY came to Plaintiff JULIAN C. LEE's home in Encinitas. Plaintiff JULIAN C. LEE was at work. Defendant JAKE GREGORY spoke with Plaintiff JULIAN C.

LEE's girlfriend's brother Bryan Ingraham. Defendant JAKE GREGORY told Mr. Ingraham that his interview had nothing to do with Plaintiff JULIAN C. LEE. Defendant JAKE GREGORY left a business card with a written note asking Plaintiff JULIAN C. LEE to call Defendant JAKE GREGORY on Tuesday. However, Plaintiff JULIAN C. LEE's girlfriend Sarah came home later that day and called Plaintiff JULIAN C. LEE at work and told him about Defendant JAKE GREGORY'S visit.

18. In response, Plaintiff JULIAN C. LEE immediately called Defendant JAKE GREGORY that same day. Plaintiff JULIAN C. LEE explained that he had no idea where his brother was and that he had not spoken to his brother in many years. Plaintiff JULIAN C. LEE also demanded that Defendant JAKE GREGORY stop following him and harassing his friends, old roommates and old girlfriend because he had no idea where his brother was located and neither did his friends.

19. The following week, on Thursday May 4, 2000, a San Diego County Sheriff's deputy was in Plaintiff JULIAN C. LEE's neighborhood questioning a neighbor about Plaintiff JULIAN C. LEE and his brother Robert. Plaintiff JULIAN C. LEE's neighbor assured the deputy that Plaintiff JULIAN C. LEE had lived there for 2-3 years and was a very nice person.

20. Thirty minutes later, Plaintiff JULIAN C. LEE's girlfriend saw a sheriff's car parked in the street by Plaintiff JULIAN C. LEE's house. She went to speak with the deputy in the car named Marco Garmo. Deputy Marco Garmo informed her that he was working with the FBI on the case involving Robert Lee and there was a warrant for his arrest from Florida. Garmo in fact was acting in

concert with, and at the direction of, defendant Jake Gregory. Sarah explained that the FBI had been looking for Plaintiff JULIAN C. LEE's brother for years and they know all about Robert and the fact that he is estranged from the Lee family and Plaintiff JULIAN C. LEE in particular.

21. Sarah immediately called Plaintiff JULIAN C. LEE at work to explain. Plaintiff JULIAN C. LEE then called deputy Marco Garmo on Garmo's cellular telephone. Plaintiff JULIAN C. LEE explained to deputy Marco Garmo that he had no idea where his brother was and that he had not spoken to him nor heard from him in years. Plaintiff JULIAN C. LEE thought that cleared up the situation.

22. Plaintiff JULIAN C. LEE came home from work that same day, Thursday May 4, 2000, and had dinner with Sarah. That evening he went out to buy some cat food at Ralphs. As he drove to Ralphs, he noticed two sheriff's cars following him. Shortly before he pulled into Ralphs parking lot, Plaintiff JULIAN C. LEE was surrounded by several sheriff's cars and ordered out of his car at gunpoint. Deputy Marco Garmo was one of the officers present. The officers told Plaintiff JULIAN C. LEE that they were arresting him on the warrant for his brother in Florida. While acting as a result of a concerted agreement with Defendant JAKE GREGORY, they placed him under arrest and took him to the Encinitas Sheriff's station.

23. When Plaintiff JULIAN C. LEE arrived in handcuffs, Defendant JAKE GREGORY was at the station waiting for Plaintiff JULIAN C. LEE. Defendant JAKE GREGORY demanded that Plaintiff JULIAN C. LEE give him information on his brother Robert. Defendant JAKE

GREGORY said he would be able to clear up the whole "Florida situation" if Plaintiff JULIAN C. LEE gave him information about his brother Robert. Plaintiff JULIAN C. LEE was astonished that he was being held under a warrant relating to charges against his brother Robert, and told Defendant JAKE GREGORY that he had no idea where his brother was and that he had not heard from him nor spoken to him in years. Defendant JAKE GREGORY replied "Have a nice trip to Florida" and walked out of the room.

24. Plaintiff JULIAN C. LEE was transferred to the Vista Jailhouse. Thereafter, he was moved to the downtown San Diego Jail.

25. Plaintiff JULIAN C. LEE was held in custody under a $35,000.00 bail. He was not able to make bail until May 8, 2000. On May 8, 2000, extradition papers were filed to begin Plaintiff JULIAN C. LEE's extradition to Dade County, Florida for the crime committed by his brother in Florida. On May 9, 2000, he was formally charged in San Diego under California Penal Code section 1551.1 for being a fugitive from justice regarding the crime his brother Robert committed in Florida. Thereafter, Plaintiff JULIAN C. LEE, through his friends, was able to hire an attorney who contacted the San Diego District Attorney's office to inform them of the true facts regarding Plaintiff JULIAN C. LEE to stop the extradition to Dade County, Florida. Plaintiff JULIAN C. LEE was freed and the extradition case was dismissed by the San Diego District Attorney's office.

III.

FIRST CAUSE OF ACTION

Violation of Constitutional Rights

by Federal Officer: *Bivens* Action

[Against Jake Gregory and DOES 1 through 10]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 25 of this Complaint and incorporates the same by reference as if there paragraphs were fully set forth herein.

26. This cause of action is based upon *Bivens v. Six Unknown Federal Narotic Agents* 403 U.S. 388 (1971). Defendant Jake Gregory deprived Plaintiff JULIAN C. LEE of the following rights under the United States Constitution:

1. Julian Lee's First Amendment right to speak as he felt appropriate to government agents without threat of vindictive government reprisal or retaliation.

2. Julian Lee's Fourth Amendment right to be free of unreasonable searches and seizures and to be free of arrests without probable cause.

3. Julian Lee's Fifth Amendment right to be free from deprivation of liberty without due process of law.

4. Julian Lee's Eighth Amendment right to be free of cruel and unusual punishment.

The arrest and detention was done in violation of due process; it was effected upon a person Gregory knew to be innocent as a way of inflicting punishment on Mr. Lee which was cruel and unusual. The knowing infliction of

pain upon a person known to be innocent is cruel and unusual punishment and in violation of the due process clause of the Fifth Amendment. Among other things, by causing the arrest and continued detention of Julian Lee defendants Gregory arrested him without probable cause, in an unreasonable manner under circumstances that would leave a reasonable person under the same circumstances to believe that no probable cause existed to arrest Julian C. Lee. The arrest and continued detention was caused by Gregory, to retaliate against Julian C. Lee for what Mr. Lee has said to Gregory in enunciating his complaints with Gregory's action, which comments were protected by the First Amendment. The arrest and detention was also to punish Mr. Lee for what defendant Jake Gregory perceived as a lack of cooperation by Mr. Julian Lee.

27. Defendants Gregory deprived Plaintiff JULIAN C. LEE of his rights alleged above under the United States Constitution to be free from unlawful and unreasonable search and seizures, to due process of law and to be free from the infliction of cruel and unusual punishment by implementing or executing a policy statement, ordinance, regulation, decision, custom or usage that permitted its employees and agents to arrest Plaintiff JULIAN C. LEE under these circumstances without probable cause with the intent to deprive plaintiff of the rights alleged herein. Plaintiff JULIAN C. LEE's right to be free from any violence, or intimidation through the threat of violence, committed against him because of his race, color, ancestry, or national origin, was violated by defendant because Plaintiff JULIAN C. LEE was battered, falsely accused, falsely arrested, wrongfully incarcerated, falsely imprisoned, wrongfully prosecuted, and held up to public shame

and obloquy. His rights under the United States Constitution were further violated, in particular, the right to be free from being compelled to speak to a law enforcement official, the right of privacy, the right to be free from unlawful searches and seizures, the right to be free from the imposition of punishment without due process of law, the right to be free from cruel and unusual punishment and the right to due process of law.

28. The conduct alleged herein caused Plaintiff JULIAN C. LEE to be deprived of his civil rights that are protected under the United States Constitution which has also legally, proximately, foreseeably and actually caused Plaintiff JULIAN C. LEE to suffer emotional distress, pain and suffering, damage to reputation and further damages according to proof at the time of trial.

29. The conduct alleged herein also amounts to oppression, fraud or malice within the meaning of Civil Code Section 3294; justifying the award of exemplary damages against defendant Gregory in an amount according to proof at the time of trial in order to deter the defendant from engaging in similar conduct and to make an example by way of monetary punishment. Plaintiff LEE is also entitled to attorney fees and costs of suit herein.

IV.

SECOND CAUSE OF ACTION

California Civil Rights Violation – Unruh Act

[Against All Defendants and DOES 1 through 10]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 29 of this Complaint and incorporates the same

by reference as if these paragraphs were fully set forth herein.

30. All persons within the State of California have the right to be free from any violence, or intimidation by threat of violence, committed against them because of their race, color, ancestry and/or national origin. This right is guaranteed by the Unruh Civil Rights Act codified at California Civil Code section 51, et seq.

31. Julian C. Lee is an African American. Plaintiff JULIAN C. LEE's right to be free from any violence, or intimidation through the threat of violence, committed against him because of his race, color, ancestry, or national origin, was violated by defendants because Plaintiff JULIAN C. LEE was battered, falsely accused, falsely arrested, wrongfully incarcerated, falsely imprisoned, wrongfully prosecuted, held up to public shame and obloquy. His rights under the United States Constitution and California Constitution were further violated, in particular, the right to be free from being compelled to speak to a law enforcement official, the right of privacy, the right to be free from unlawful searches and seizures, the right to be free from the imposition of punishment without due process of law, the right to be free from cruel and unusual punishment and the right to due process of law.

32. Due to the violation of Plaintiff JULIAN C. LEE's rights by all defendants, Plaintiff JULIAN C. LEE suffered economic damages and non-economic damages, including, but not limited to, emotional distress, pain and suffering, fear and humiliation caused by the acts complained of herein according to proof at the time of trial.

33. Plaintiff JULIAN C. LEE is also entitled to the statutory civil penalties, exemplary damages and attorneys' fees and costs of suit incurred herein.

V.

THIRD CAUSE OF ACTION

False Arrest/Imprisonment

[Against All Defendants and DOES 1 through 10]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 33 of his Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

34. Defendants intentionally and unlawfully exercised force or the express or implied threat of force to restrain, detain or confine Plaintiff JULIAN C. LEE.

35. The restraint, detention or confinement compelled Plaintiff JULIAN C. LEE to stay or go somewhere for some appreciable time.

36. Plaintiff JULIAN C. LEE was unlawfully arrested and taken into custody.

37. The Defendants authorized, encouraged, directed or assisted an officer in either doing an unlawful act or procuring without proper process, Plaintiff JULIAN C. LEE's arrest.

38. The restraint, detention, confinement and arrest caused Plaintiff JULIAN C. LEE to suffer injury, damage, loss or harm according to proof at the time of trial.

39. The conduct of defendants also amounts to oppression, fraud or malice within the meaning of civil code section 3294 et seq. and punitive damages should be assessed against each defendant for the purpose of punishment and for the sake of example.

VI.

FOURTH CAUSE OF ACTION

Malicious Prosecution

[Against All Defendants and DOES 1 through 10]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 39 of his Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

40. By engaging in the acts alleged herein, the Defendants initiated or were actively instrumental in procuring the arrest and prosecution in a criminal action.

41. The arrest proceeding and criminal action against Plaintiff JULIAN C. LEE terminated in his favor.

42. The Defendants acted without probable cause in initiating the arrest or procuring the arrest or prosecution of Plaintiff JULIAN C. LEE and they acted with malice.

43. As a direct, proximate and foreseeable result, Plaintiff JULIAN C. LEE suffered damage according to proof at the time of trial.

44. The conduct of Defendants also amounts to oppression, fraud or malice within the meaning of civil code section 3294 et seq. and punitive damages should be

assessed against each defendant for the purpose of punishment and for the sake of example.

VII.

FIFTH CAUSE OF ACTION

Abuse of Process

[Against All Defendants and DOES 1 through 10]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 44 of his Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

45. The Defendants abused the process of this court by misusing the power of the court by acts done in the name of the court and under its authority by means of use of a legal process not proper in the conduct of a proceeding for the purpose of perpetrating an injustice.

46. In particular, the Defendants used the legal process in a wrongful manner, not proper in the regular conduct of a proceeding to accomplish a purpose for which it was not designed because [sic] used the Florida warrant to manipulate the process in California and battered, falsely accused, falsely arrested, wrongfully incarcerated, falsely imprisoned, wrongfully prosecuted, held up to public shame and obloquy, and his rights under the United States Constitution were violated, in particular the right to be free from unlawful searches and seizures under the Fourth Amendment, right to be free from the imposition of punishment without due process of law and the right to due process of law under the Fifth Amendment. They also used the process to wrongfully commence extradition against Plaintiff Lee and wrongfully charge him with a

felony for being a fugitive from the law and punish him for what Defendant JAKE GREGORY perceived to be a lack of cooperation.

47. The conduct alleged herein caused Plaintiff JULIAN C. LEE to be deprived of his civil rights that are protected under the United States Constitution which has also legally, proximately, foreseeably and actually caused Plaintiff LEE to suffer emotional distress, pain and suffering, damage to reputation and further damages according to proof at the time of trial.

48. The conduct alleged herein also amounts to oppression, fraud or malice within the meaning of Civil Code Section 3294; justifying the award of exemplary damages against all Defendants in an amount according to proof at the time of trial in order to deter the Defendants from engaging in similar conduct and to make an example by way of monetary punishment.

VIII.

SIXTH CAUSE OF ACTION

Battery

[Against All Defendants and DOES 1 through 10]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 48 of his Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

49. The Defendants, and each of them, acted with an intent to cause harmful or offensive contact with the person of Plaintiff JULIAN C. LEE and the intended

harmful or offensive contact did in fact occur. The harmful or offensive contact was not privileged nor consented to.

50. As a result of the Defendants' intent to cause harmful or offensive contact with the person of Plaintiff Lee and the fact that the intended harmful or offensive contact did in fact occur, Plaintiff JULIAN C. LEE suffered damages according to proof at the time of trial. Said damages are currently in excess of the jurisdictional minimum of this court.

51. The conduct of Defendants also amounts to oppression, fraud or malice within the meaning of Civil Code section 3294 et seq. and punitive damages should be assessed against each defendant for the purpose of punishment and for the sake of example.

IX.

SEVENTH CAUSE OF ACTION

Intentional Infliction of Emotional Distress

[Against All Defendants and DOES 1 through 10]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 51 of his Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

52. By engaging in the acts alleged herein, the Defendants engaged in outrageous conduct that was intended to cause Plaintiff JULIAN C. LEE to suffer emotional distress or engaged in the conduct with a reckless disregard of the probability of causing Plaintiff JULIAN C. LEE to suffer emotional distress.

53. As a direct, proximate and foreseeable result, Plaintiff JULIAN C. LEE suffered sever emotional distress and the outrageous conduct was the cause of the emotional distress suffered by Plaintiff JULIAN C. LEE.

54. The conduct of Defendants also amounts to oppression, fraud or malice within the meaning of Civil Code section 3294 et seq. and punitive damages should be assessed against each defendant for the purpose of punishment and for the sake of example.

X.

EIGHTH CAUSE OF ACTION

Negligence

[Against All Defendants and DOES 1 through 10]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 54 of his Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

55. Defendants had a duty to Plaintiff JULIAN C. LEE to act with ordinary care and prudence so as not to cause harm or injury to another.

56. By engaging in the acts alleged herein, the Defendants failed to act with ordinary care and breached their duty of care owed to Plaintiff JULIAN C. LEE.

57. As a direct, proximate and foreseeable result of the Defendants breach of their duty of care, Plaintiff JULIAN C. LEE suffered damages in an amount according to proof at the time of trial.

XI.

NINTH CAUSE OF ACTION

Negligent Infliction of Emotional Distress

[Against All Defendants and DOES 1 through 10]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 57 of his Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

58. By engaging in the acts alleged herein, the Defendants engaged in negligent conduct and a willful violation of the laws of the State of California causing plaintiff to suffer serious emotional distress.

59. As a direct, proximate and foreseeable result, Plaintiff JULIAN C. LEE suffered serious emotional distress and the outrageous conduct was the cause of the emotional distress suffered by Plaintiff JULIAN C. LEE.

XII.

TENTH CAUSE OF ACTION

Negligent Supervision and Training

[Against The United States]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 59 of his Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

60. The Federal Bureau of Investigation, an agency of defendant United States by employing persons in the capacity of peace officers, has a duty to ensure proper training so that the officers, in performing their duties, do

not violate the federally protected constitutional rights of citizens.

61. The Federal Bureau of Investigation is specifically deficient in training officers with regard to their responsibilities under the Fourth Amendment to have probable cause before executing an arrest warrant, to truthfully disclose all material facts in seeking an arrest warrant and to avoid false or misleading statements when applying for arrest warrants, and to act with due care to insure that no one who is innocent of wrongdoing is falsely arrested.

62. These training deficiencies resulted from the Federal Bureau of Investigation's deliberate indifference to rights guaranteed by the Fourth Amendment rights.

63. The deliberate indifferent training and lack thereof was the cause and moving force behind the violation of Plaintiff JULIAN C. LEE's Fourth Amendment rights.

64. The deliberately indifferent training and lack thereof by the Federal Bureau of Investigation caused Plaintiff JULIAN C. LEE to suffer damages according to proof at the time of trial. As such, Plaintiff JULIAN C. LEE is entitled to attorney fees and punitive damages according to proof.

XIII.

ELEVENTH CAUSE OF ACTION

Negligent Hiring and Retention

[Against The United States]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 64 of his Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

65. The Federal Bureau of Investigation, an agency of defendant United States by employing persons in the capacity of peace officers, has a duty to ensure that its agents are adequately qualified and continue to receive proper and adequate training after they are hired.

66. The Federal Bureau of Investigation was specifically deficient in making sure that Defendant JAKE GREGORY was adequately qualified and continued to receive adequate training with regard to his responsibilities under the Fourth Amendment to have probable cause before obtaining an arrest warrant, to truthfully disclose all material facts in seeking an arrest warrant and to avoid false or misleading statements when applying for arrest warrants, and to act with due care to insure that affidavits submitted are truthful and accurate.

67. These deficiencies in qualifications and retention of Defendant JAKE GREGORY resulted from the Federal Bureau of Investigation's deliberate indifference to rights guaranteed by the Fourth Amendment rights.

68. The deliberate indifference was the cause and moving force behind the violation of Plaintiff JULIAN C. LEE's Fourth Amendment rights.

69. The deliberate indifference by the Federal Bureau of Investigation caused Plaintiff JULIAN C. LEE to suffer damages according to proof at the time of trial. As such, Plaintiff JULIAN C. LEE is entitled to attorney fees and punitive damages according to proof.

WHEREFORE, Plaintiff JULIAN C. LEE prays as follows:

FIRST CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;
2. Special damages according to proof at the time of trial;
3. Any further declaratory relief as this Court deems just;
4. Costs of suit and attorney fees incurred herein; and
5. Exemplary damages.

SECOND CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;
2. Special damages according to proof at the time of trial;
3. Any further declaratory relief as this Court deems just; and
4. Costs of suit and attorney fees incurred herein; and
5. Exemplary damages.

THIRD CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;

2. Special damages according to proof at the time of trial;

3. Any further declaratory relief as this Court deems just;

4. Costs of suit and attorney fees incurred herein, and

5. Exemplary damages.

FOURTH CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;

2. Special damages according to proof at the time of trial;

3. Any further declaratory relief as this Court deems just;

4. Costs of suit and attorney fees incurred herein; and

5. Exemplary damages.

FIFTH CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;

2. Special damages according to proof at the time of trial;

3. Any further declaratory relief as this Court deems just;

4. Costs of suit and attorney fees incurred herein; and

5. Exemplary damages.

SIXTH CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;

2. Special damages according to proof at the time of trial;

3. Any further declaratory relief as this Court deems just;

4. Costs of suit and attorney fees incurred herein; and

5. Exemplary damages.

SEVENTH CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;

2. Special damages according to proof at the time of trial;

3. Any further declaratory relief as this Court deems just;

4. Costs of suit and attorney fees incurred herein; and

5. Exemplary damages.

EIGHTH CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;

2. Special damages according to proof at the time of trial;

3. Any further declaratory relief as this Court deems just; and

4. Costs of suit and attorney fees incurred herein.

NINTH CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;

2. Special damages according to proof at the time of trial;

3. Any further declaratory relief as this Court deems just;

4. Costs of suit and attorney fees incurred herein; and

TENTH CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;

2. Special damages according to proof at the time of trial;

3. Any further declaratory relief as this Court deems just;

4. Costs of suit and attorney fees incurred herein; and

5. Exemplary damages.

ELEVENTH CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;

2. Special damages according to proof at the time of trial;

3. Any further declaratory relief as this Court deems just;

4. Costs of suit incurred herein; and

5. Exemplary damages.

DATED: July 2, 2001

Law Offices of Eugene G. Iredale

By: /s/ Eugene G. Iredale
Eugene G. Iredale, Esq.

DATED: July 2, 2001

Law Offices of Douglas S. Gilliland

By: /s/ Douglas S. Gilliland
Douglas S. Gilliland, Esq.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JULIAN C. LEE, an individual, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, a federal agency, JAKE GREGORY, an individual, UNITED STATES, and DOES 1-100, inclusive, Defendants.	CASE NO. 01CV0739-K(RBB) DECLARATION OF JULIAN CHRISTOPHER LEE September 24, 2001 11:00 a.m.

I, JULIAN CHRISTOPHER LEE, being duly sworn, hereby state as follows:

1. I am the plaintiff in this case.

2. I have no criminal record of any kind. I have never been arrested nor charged with any crime, save for the arrest in this case.

3. After high school, I joined the United Stated Marine Corps. I became a weapons instructor in Quantico, Virginia. At Quantico, I taught classes in weapons and static displays to FBI Agents, DEA Agents and officers from every branch of the armed services.

4. When Desert Storm began, I was transferred to Camp Pendleton where I was a section leader in a weapons company. My unit was later transferred to the Gulf

where it was involved in Desert Storm's Desert Shield strategy.

5. After my military service, I returned to California to resume civilian life. I worked as a foreman with the San Diego Gas and Electric Company and later for Continental Central Credit. When my father had a stroke, I went into commercial fishing in Alaska and worked so I could help pay my father's medical bills and help buy my parents a house that would accommodate my father's wheelchair.

6. After helping to buy my parents a house, I moved back to California. In July of 1998, I resumed work in the collection industry, working for Household Automotive Finance. I have worked for Household Automotive Finance continuously since July of 1998.

7. I have three brothers and one sister. One of my brothers is named Robert Q. Lee. I have not seen him for a decade. My brother is a fugitive from charges in New Jersey. I became aware several years ago that my brother Robert Q. Lee was using my name and social security number, as well as the names and social security numbers of my brother Kenneth Lee, my other brother Wilmore Lee, as well as that of my cousin Robert McMillan. I became aware of this because these facts had been reported to one of my brothers and one of my cousins by the FBI who informed them that Robert was in fact using our names and social security numbers during the time he was a fugitive. I became aware of this well before I was arrested in May 2000.

8. I have never been to Miami, Florida.

9. At the time of my arrest, in May of 2000, I stood 6' 3" tall and weighed at least 284 pounds. My driver's

license which was issued in March of 2000 reflected my proper height and weight. It was quite apparent to me and to anyone who had seen me that I weighed at least 284 pounds. In fact, my weight at the time I saw and spoke with FBI agent Jake Gregory on May 2000, was over 290 pounds.

10. I became aware in the year 2000 that an FBI agent was asking friends and relatives of mine questions about me. I obtained the telephone number of Mr. Jake Gregory from Brian Ingraham, my girlfriend's brother who had spoken to Mr. Gregory at my home while I was not there. Brian Ingraham related to me that Gregory had requested that I call him.

11. As a result of this request, I telephoned FBI agent Jake Gregory. I identified myself as Julian Christopher Lee. After I identified myself, I asked Jake Gregory if there was any law that required me to speak with him. He replied that there was not. I said to him that I wanted him to stop harassing my friends and to stop harassing me. I told him that I had not seen my brother for many years. Because I was angry, I cursed at him. I then hung up the phone.

12. Approximately a week after my telephone call with Mr. Jake Gregory, I was placed under arrest by the San Diego County Sheriffs. A Sheriff whose name I believe to be Marco Garmo told me that he was working with the FBI in this matter. I told the Sheriffs that I was not the person that they were seeking who was described in the warrant.

13. During the transportation to the Sheriff's station, I saw what I believed to be a copy of the warrant from Florida. In hand writing there were annotations

which were further descriptions of the person named in the warrant. The hand written descriptions that I saw on the warrant included notations that the person had a shaved head, light complexion, weighed approximately 180 pounds, was 6 feet tall and had hazel eyes. These physical attributes all applied to my brother and were clearly not applicable to me. I have never had a shaved head. I wore shoulder length dread locks at the time of my arrest and have had them for several years.

14. FBI Agent Gregory spoke to me in the cell at the Sheriff's station within approximately five minutes of my arrival there. When he first came into the cell to speak with me he said words to the effect of "Are you ready to talk to me now? The last time I talked to you, you had an attitude". He then said "Do you want to go home? Do you want to get out of here tonight? Then tell me where your brother is." I told him "Like I told you on the phone, I don't know where he is." FBI agent Gregory said "If you want to get out of this Florida situation, you better talk to me now about your brother, otherwise you will be staying here in jail." I told him again that I did not know where my brother was and had not seen him for many years.

15. I told Gregory that my brother had been using my name and social security number as well as that of my other brothers, and that our family had learned this information from the FBI itself several years before. I told him that I had never been in Florida, and that I was clearly not the person who was named in the warrant because I was several inches taller, about 100 pounds heavier, had a different hair style, different color eyes and a different complexion. I told Gregory that he could call my job and that they could verify that I had never been to Florida and had been working in San Diego since June

1998, and therefore could not have committed any crime in Florida in December of 1998.

16. I asked Gregory to please check because he was arresting the wrong person. Gregory simply smiled at me and asked me again if I could help him with information about my brother. When I reiterated for the third time that I had no information about my brother Robert, he smiled at me, threw up his hand and said to me "have a nice flight to Florida". He then left.

17. It was clear to me that Agent Gregory was upset and angry because I had previously cursed at him and hung up the phone. It was also clear to me that he was telling me that if I gave him the information he felt I had concerning my brother, he would release me immediately. He did not tell me anything about his willingness to contact Florida authorities to obtain assistance for me in "my" Florida case. Rather, he made it quite clear that he would arrange for me to be released immediately if I gave him the information he was seeking.

18. When I told him that I was not the person named in the warrant from Florida and had never been in Florida, he did not object, protest or state that I was. Rather he smiled and pointed out that my name was Julian Christopher Lee and the Florida warrant was for a person named Julian Christopher Lee and that if I wanted to clear the matter up I had better give him the information he wanted. Throughout the time I spoke with Gregory, he made it clear to me that if I provided the information he wanted I would be released.

DATED: September 10, 2001

/s/ Julian C. Lee
JULIAN CHRISTOPHER LEE

[SEAL]
Gloucester County Prosecutor
P.O. Box 623
Woodbury, New Jersey 08088
(609) 384-5500
FAX (609) 384-8824

[Names Omitted In Printing]

February 6, 1997

Jeremy Frey, U.S. Attorney
District of New Jersey
U.S. Court House
P.O. Box 2098
Camden, New Jersey 08101

Re: State of New Jersey v. Robert Q. Lee
Gloucester County Indictment 93-02-00103
DOB 12/21/65, FBI #50360EA4

Dear Mr. Frey:

This office requests your assistance in locating the above subject. We also request the subject be charged with an unlawful flight to avoid prosecution warrant.

The current information received is that subject has changed his name to Christopher Lee, DOB 3/7/67 and he may be residing with his brother, Alex Fukay, 5675 Old Pascagoula Road, Mobile, Alabama, Phone 334-653-8851.

Mr. Lee is wanted by this office for armed robbery and aggravated assault.

Enclosed you will find our arrest warrant for Mr. Lee and if apprehended our office will extradite.

Thank you for your cooperation in this matter.

Very truly yours,

ANDREW N. YURICK
COUNTY PROSECUTOR

By /s/ N. R. Armstrong
N. Robert Armstrong
Chief of County Investigation

Enclosure
Faxed 2/6/97
CC: FBI Special Agent Paul Murray/Cherry Hill
John C. Porter, Sgt./CCPO Fugitive Unit

United States District Court
District of New Jersey

UNITED STATES OF AMERICA	:	
v.	:	**WARRANT FOR ARREST**
ROBERT Q. LEE a/k/a Christopher Lee	:	**Case Number: 97-2005**

To: The United States Marshal Special Agents of the Federal Bureau of Investigation, and any Authorized United States Officer

YOU ARE HEREBY COMMANDED to arrest ROBERT Q. LEE, a/k/a Christopher Lee and bring him or her forthwith to the nearest magistrate judge to answer a(n)

___ Indictment ___ Information _X_ Complaint
___ Order of Court ___ Violation Notice ___ Probation Violation Petition

charging him or her with (brief description of offense)

Unlawful flight to avoid prosecution (UFAP).

in violation of Title 18, United States Code, Section(s) 1073.

Honorable Joel B. Rosen — United States Magistrate Judge
Name of Issuing Officer — Title of Issuing Officer

/s/ Joel B. Rosen — February 7, 1997 at Camden, NJ
Signature of Issuing Officer — Date and Location

Bail fixed at $ _____ by _____
Name of Judicial Officer

RETURN		
This warrant was received and executed with the arrest of the above-named defendant at _____		
DATE RECEIVED	NAME AND TITLE OF ARRESTING OFFICER	SIGNATURE OF ARRESTING OFFICER
DATE OF ARREST		

United States District Court
District of New Jersey

UNITED STATES OF AMERICA	:	**CRIMINAL COMPLAINT**
v.	:	**Magistrate No. 97-2005**
ROBERT Q. LEE a/k/a Christopher Lee	:	(Filed Feb. 7, 1997)

I, the undersigned complainant being duly sworn state the following is true and correct to the best of my knowledge and belief. In or about April, 1994 in Gloucester County, in the District of New Jersey and elsewhere, defendant did:

knowingly and willfully travel in interstate commerce from the State of New Jersey to the Commonwealth of Alabama with the intent to avoid prosecution for the crimes of Robbery and Aggravated Assault with a Deadly Weapon, which are felon[y] offenses, contrary to New Jersey Statutes Sections 2C:15-1 and 2C:12-1b(2).

In violation of Title 18, United States Code, Section 1073.

I further state that I am a Special Agent with the Federal Bureau of Investigation and that this complaint is based on the following facts:

SEE ATTACHMENT

/s/ William P. Grace
Signature of Complaint
Williams P. Grace
Special Agent, F.B.I.

Sworn to before me and subscribed in my presence,

February 7, 1997	at	Camden, New Jersey
Date		City and State

Honorable Joel B. Rosen United States Magistrate Judge	/s/	Joel B. Rosen
Name & Title of Judicial Officer		Signature of Judicial Officer

---

Attachment

I, William P. Grace, being duly sworn, deposes and says:

1. On or about February 25, 1993, an indictment was handed down by a grand jury sitting in Gloucester County, New Jersey, charging the defendant ROBERT Q. LEE with Robbery and Aggravated Assault with a Deadly Weapon, in violation of N.J.S.A. sections 2C:15-1 and 2C:12-1b(2).

2. On or about April 14, 1994, an arrest warrant was issued by Superior Court Judge Donald A. Smith, Jr., for the arrest of defendant ROBERT Q. LEE for violation of N.J.S.A. sections 2C:15-1 and 2C:12-1b(2). Since that time, the local authorities have been unable to locate the defendant ROBERT Q. LEE in the State of New Jersey.

3. On or about February 6, 1997, our office received information from the Gloucester County Prosecutor's Office that the defendant ROBERT Q. LEE has changed his name to Christopher Lee, and that he may be residing in Mobile, Alabama with family members.

4. The Gloucester County Prosecutor's Office has indicated that if the defendant is apprehended, he will be extradited to the State of New Jersey to face charges.

No. 05-344

IN THE

Supreme Court of the United States

JAKE GREGORY,

Petitioner,

v.

JULIAN C. LEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY FOR PETITIONER

JEFFREY A. LAMKEN
Counsel of Record
JACOB A. SOMMER
HEATHER M. MCCANN
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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STATUTE AND RULE

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REPLY FOR PETITIONER

Respondent does not dispute that the Ninth Circuit denied FBI Special Agent Jake Gregory qualified immunity based on allegations about Gregory's state of mind. Instead, respondent defends that reasoning: "[T]he inquiry into whether an officer acted reasonably," respondent states, "requires a determination of *what was in the official's mind*; * * * what did [he] *believe*?" Br. in Opp. 22 (emphasis added); see *ibid.* (court "must make an inquiry into what was in the officer's mind"). Like the courts below, respondent eschews resolving probable cause based solely on *the objective evidence* before the officer—what he saw, read, and heard. Like the courts below, respondent declines to address, for qualified immunity purposes, whether "a reasonable officer" with precisely the "information possessed" by Agent Gregory "*could have* believed" there was cause for respondent's arrest. *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987) (emphasis added).

To respondent and the Ninth Circuit alike, Fourth Amendment reasonableness and qualified immunity instead depend on a *jury's* assessment of the "beliefs and inferences in [Agent Gregory]'s mind." Br. in Opp. 22. Thus, it is of no moment that, as respondent concedes, the Ninth Circuit found no "dispute about the evidence before Agent Gregory—*i.e.*, what [A]gent Gregory saw and heard." Pet. 7; Br. in Opp. 18 ("this is true"). It matters not that that evidence included a facially valid Florida warrant issued in respondent's name, with respondent's Social Security number, date of birth, gender, race, and approximate height. Nor does it matter that the warrant omitted the scars and identifying marks included in every description of respondent's brother. Instead, qualified immunity is unavailable because a juror could find that Agent Gregory subjectively concluded from the evidence—and thus "knew"—that respondent's brother, not respondent, had committed the Florida crimes. Because "[k]nowingly arresting the wrong person" is "self-evidently" unlawful, the Ninth Circuit declared, there must be a trial to "determine whether Gregory knew or did not know he was causing the arrest of the wrong

man." Pet. App. 10a. And the dispositive issue for the jury is whether Gregory in fact "mistakenly[] believed" that respondent was the person sought by Florida authorities, or whether he believed respondent was innocent but "procured [respondent's] arrest" under the warrant nonetheless to "pressur[e] [respondent] to provide information." Pet. App. 22a-23a.

That approach conflicts with this Court's Fourth Amendment and qualified immunity decisions, including *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), which "reject the inquiry into state of mind in favor of a *wholly objective* standard." *Davis* v. *Scherer*, 468 U.S. 183, 191 (1984) (emphasis added); see *Whren* v. *United States*, 517 U.S. 806, 813 (1996) (officer's "state of mind" irrelevant if "the circumstances, viewed objectively," justify the action). It conflicts with the First Circuit's decisions in *Floyd* v. *Farrell*, 765 F.2d 1 (1985), and *Brady* v. *Dill*, 187 F.3d 104 (1999), which make clear that the "objective reasonableness" standard looks to the *facts before* the officer, not allegations about the thoughts the officer had in his mind. It exacerbates disarray on this issue in the federal courts. And it has a profound impact on law enforcement, making qualified immunity nearly impossible to resolve before trial in a growing category of cases. See Pet. 25-27; Br. State Amici 12.

Respondent's brief in opposition offers only a half-hearted effort to address the circuit conflict (Br. in Opp. 25-26) and the issue's importance (*id.* at 26). Instead, respondent devotes much of his argument (*id.* at 15-20) to the unfounded claim that this Court lacks jurisdiction under *Johnson* v. *Jones*, 515 U.S. 304 (1995). We address those arguments in turn.

I. The Ninth Circuit's Decision Conflicts With This Court's And The First Circuit's Precedents

A. Respondent does not dispute that, under the "objective" Fourth Amendment and qualified immunity standards adopted by this Court, the officer's motives are irrelevant. Reasonableness depends on the "facts known" and "information possessed" by the officer. Br. in Opp. 21-22. For Fourth Amendment purposes, the question is "whether the[] historical facts, viewed from the standpoint of an objectively reasonable

police officer, amount to * * * probable cause." *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996). For qualified immunity, the issue is whether "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that probable cause existed; if "officers of reasonable competence could disagree on this issue, immunity [must] be recognized." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986).

Seizing on the need to determine the "facts and circumstances within [the officer's] knowledge," Br. in Opp. 20, 21; see *id.* at 25, 26, respondent urges that courts may "inquir[e] into what was in the officer's mind," the "inferences" he allegedly drew, and thus what the officer "believe[d]." *Id.* at 22, 23. But that conflates knowledge with subjective belief. In the Fourth Amendment and qualified immunity contexts, an officer's "knowledge" consists of the facts the officer observed (and which any officer in his shoes would also have observed), *i.e.*, the "information possessed" by the officer and "the circumstances [he] confronted." *Anderson*, 483 U.S. at 640, 641. The officer's subjective assessments of those facts and his conclusions are precisely the sort of "subjective beliefs" this Court has long deemed "irrelevant." *Id.* at 641; Pet. 14-18.

B. Respondent's and the Ninth Circuit's conflation of "knowledge" with inference and subjective belief squarely conflicts with the First Circuit's decisions in *Floyd* and *Brady*. In *Floyd*, the plaintiff (like respondent here) alleged that the arresting officer had inferred and thus "knew" he was innocent, but arrested him nonetheless. Pet. 19-20. Respondent nowhere disputes that the First Circuit explicitly rejected reliance on the officer's "own evaluation of the facts before him"—including the claim that he "believe[d] that" the plaintiff "did not know the car was stolen." 765 F.2d at 6. Nor does respondent deny that the Ninth Circuit reached the opposite result here, holding that Gregory's alleged belief in respondent's innocence was not only relevant but dispositive.

Nonetheless, respondent urges that *Floyd* is limited to the issue of "motive," and he quotes it as holding that an "objective analysis of the reasonableness of conduct" requires the

court to consider "the facts *actually known* to the officer and not consider *the officer's motives* * * *." Br. in Opp. 25 (some emphasis added). But that "quotation" omits the critical language. In fact, *Floyd* states that courts must look to "the facts actually known to the officer and not consider *the individual officer's subjective assessments* of those facts." 765 F.2d at 6 (emphasis added). The First Circuit thus held that courts may not do precisely what the Ninth Circuit did here—*i.e.*, determine reasonableness by examining the individual officer's subjective "evaluation of the facts before him," rather than examining the objective facts themselves. *Id.* at 6.

Nor does respondent reconcile the Ninth Circuit's decision with *Brady*, *supra*. In *Brady*, as here, the plaintiff was arrested under a warrant issued in his name because his brother had appropriated his identity. See Pet. 21. The plaintiff in *Brady*, like respondent here, claimed that the officers detained him even though they had concluded (and thus "knew") that he was innocent. *Ibid.* But the First Circuit in *Brady*, unlike the Ninth Circuit here, held that allegation to be irrelevant. Assuming the officers "came to believe, with some degree of subjective certainty, that the man they had arrested, though named in the warrant, was innocent of the underlying charge," the court declared, that "is not knowledge, but subjective belief." 187 F.3d at 113. Citing this Court's decision in *Whren*, *supra*, the First Circuit held that allegations about that "kind of subjective belief" are irrelevant. *Ibid.* Thus, under *Brady*, courts evaluating knowledge in the First Circuit are limited to the objectively observable information before the officer—and may not consider, as the Ninth Circuit did here, what the particular officer allegedly inferred from his observations. See also *Tower* v. *Brown*, 326 F.3d 290, 296 (1st Cir. 2003) (we may "not consider the individual officer's subjective assessment").

Respondent asserts that *Brady* is "inapposite" because that decision states, in a footnote, that the result might be different where the plaintiff is not the person actually "named in [the] facially valid warrant." Br. in Opp. 26 (quoting 187 F.3d at 115 n.10). But that does not distinguish *Brady* from this case. No

less than the plaintiff in *Brady*, respondent was the person named in the warrant. Both were identified by "name, date of birth, and Social Security number." 187 F.3d at 106; Pet. App. 4a. It just turns out that in both cases, because of filial identity theft, the warrants had been issued for the wrong brother.

Respondent also ignores the rampant confusion throughout the federal courts. See Pet. 23-25. Respondent thus does not deny that the courts of appeals, see, *e.g.*, *Gay* v. *Wall*, 761 F.2d 175 (4th Cir. 1985); *Sanders* v. *City of Flatwoods*, No. 90-5540, 1991 WL 100588, at *2 (6th Cir. June 11, 1991), and the district courts are in disarray over whether objective reasonableness "take[s] into account the subjective view of the defendant," *e.g.*, *Hebein* v. *Young*, 37 F. Supp. 2d 1035, 1043 (N.D. Ill. 1998), or precludes "speculation" about his "thoughts" and "subjective state of mind," *e.g.*, *Fletcher* v. *Tom Thumb, Inc.*, No. Civ. 99-1680, 2001 WL 893913 (D. Minn. Aug. 7, 2001).

C. The issue, moreover, is important. As the petition (at 25-27) and the thirteen State Amici (at 12-13) explain, the Ninth Circuit's decision effectively prevents qualified immunity from being resolved before trial. Proof at the arrest stage (probable cause) is rarely air tight, and an erroneously arrested individual will almost always be able to point to some discrepancy suggesting that the officer was arresting the "wrong" person. Br. State Amici 12; *Brady*, 187 F.3d at 113 ("descriptive innaccuracies" are "commonplace"). Under the Ninth Circuit's approach, that will always give rise to a triable issue of fact on whether the officer "knew"—*i.e.*, subjectively inferred—that he was arresting an innocent person. *Ibid.* In this case, for example, respondent was arrested under a warrant issued in his name, with his Social Security number, birth date, and approximate height.[1] Yet the Ninth Circuit rejected qualified immunity by finding a "dispute" over whether

[1] Contrary to respondent's assertion, J.B. Kleiman's description of respondent (as "over six feet tall and weigh[ing] more than 200 pounds"), Br. in Opp. 6, 23, did "match" the warrant, which described the suspect as 6' 1" tall and weighing approximately 200 pounds. C.A. E.R. 83.

Gregory "knew" (based largely on a weight discrepancy) that the warrant should have been issued for respondent's brother—even though the warrant omitted the scars and marks that characterized respondent's brother. See Pet. 4.

This Court repeatedly has warned against any approach that "routinely places the question of immunity in the hands of a jury." *Hunter* v. *Bryant*, 502 U.S. 224, 227-228 (1991); see *Saucier* v. *Katz*, 533 U.S. 194, 200-201 (2001) ("[W]e have repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation."). If arresting officers confront the "peril" of litigation and trial any time there is a "discrepancy" in the warrant description, "many a criminal will slip away." *Johnson* v. *Miller*, 680 F.2d 39, 41 (7th Cir. 1982). Worse, if evidence that the officer subjectively believed the arrestee was "innocent" is a sufficient basis for burdensome litigation, officers may decline to pursue alternative suspects after arrest for fear that those efforts will become evidence they "knew" the detainee was innocent. It was precisely those sorts of consequences that prompted this Court, in *Harlow*, to reject inquiries into the officer's subjective thoughts and replace them with a wholly objective standard that looks to the information and circumstances before the officer. 457 U.S. at 816-817.

Officers executing facially valid warrants face an ever-increasing risk of suit for false arrest—even when, as here, they arrest the very person named in the warrant. Pet. 28. Indeed, the federal reporters are replete with decisions addressing mistaken arrests resulting from identity theft, and identity theft is on the rise. Confronted by the threat of suit for virtually every arrest, officers may hesitate to execute facially valid warrants—from other jurisdictions or their own—forestalling the sort of decisive action upon which effective law enforcement depends. Pet. 29 & n. 6.

II. This Court Has Jurisdiction Over The Legal Issue Presented By The Petition

Respondent's claim that this Court lacks jurisdiction under *Johnson* v. *Jones*, 515 U.S. 304 (1995), is baseless. As *Johnson*

explains, orders denying qualified immunity are "appealable 'final decisions'" within the meaning of 28 U.S.C. § 1291—so long as "the issue appealed concern[s], not which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of 'clearly established' law." 515 U.S. at 311 (citing *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985)). *Johnson* clarified that officials cannot challenge decisions regarding "which facts a party may, or may not, be able to prove at trial." 515 U.S. at 313; *id.* at 319-320 (whether "the pretrial record sets forth a 'genuine' issue of fact"). But "*Johnson* reaffirmed that summary-judgment determinations are appealable when they resolve a dispute concerning an *'abstract issu[e] of law' relating to qualified immunity*," such as whether "the conduct which the District Court deemed sufficiently supported * * * met the *Harlow* standard of 'objective legal reasonableness.'" *Behrens* v. *Pelletier*, 516 U.S. 299, 313 (1996) (emphasis added).

Respondent does not deny that the petition presents precisely the sort of "'abstract issu[e] of law' relating to qualified immunity" that can be raised notwithstanding *Johnson*. *Behrens*, 516 U.S. at 313. The petition does not challenge whether "the evidence" was sufficient to "support a finding that particular conduct occurred." *Ibid.* Instead, it presents "an issue of law," Br. in Opp. 16—whether "the lawfulness of a seizure under the Fourth Amendment, and the availability of qualified immunity, may turn on allegations that the officer subjectively inferred * * * —and thus 'knew'—that the arrestee was innocent." Pet. i; Br. in Opp. 18-19. This Court repeatedly has granted review to address similar qualified immunity questions in precisely this procedural context. See, *e.g.*, *Saucier*, 534 U.S. at 196 (whether qualified immunity and Fourth Amendment inquiries merge in excessive force cases); *Anderson*, 483 U.S. at 638-639 ("level of generality" at which "clearly established law" is determined); *Harlow*, 457 U.S. at 816-817 (adopting objective standard for qualified immunity).

While conceding that the question before this Court is within the limits set forth by *Johnson*, respondent urges that